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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TIFFANY PALOMBI, Plaintiff and Appellant, v. CHRYSLER GROUP LLC et al., Defendants and Respondents.	A156166 (Solano County Super. Ct. No. FCS043387)

Plaintiff Tiffany Palombi accepted a Code of Civil Procedure section 998 offer of compromise from defendant FCA US LLC (FCA) and agreed to dismiss her lawsuit under the Song-Beverly Consumer Warranty Act (Civ. Code,[1] § 1790 et seq.; hereafter, the Act) in exchange for FCA's payment of $75,000 plus costs and expenses, and reasonable attorney fees. Palombi then moved for $163,205.60 in attorney fees and costs.

The trial court awarded Palombi a significantly reduced amount of $2,221.95, limiting her recovery to fees and costs incurred on or before May 19, 2014—the date of FCA's first written settlement offer to Palombi during the litigation. The trial court found it was unreasonable for Palombi to continue prosecuting her action after that date in order to pursue civil penalties against FCA because FCA had acted reasonably and in good faith in

[1] Further undesignated statutory references are to the Civil Code.

making its settlement offers. On appeal, Palombi argues the trial court applied incorrect legal criteria to curtail her recovery of fees and costs and therefore abused its discretion. We agree and reverse the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 2012, Palombi purchased a new Dodge Avenger for $25,749, which included taxes, fees, and financing charges on a six-year loan. The vehicle was distributed by FCA, which provided a written warranty. Approximately six months later, the vehicle (with under 13,000 miles traveled) began to have engine problems, so Palombi took it to an FCA-authorized repair facility. The technicians were unable to identify the source of the problem. Seven months later, Palombi again brought the vehicle to an FCA-authorized repair facility for continued engine problems. The vehicle remained at the facility for 19 days while technicians attempted to correct the issue.

Four months later, Palombi again brought the vehicle to an FCA-authorized repair facility, this time reporting the transmission was jerking. The technicians attempted to repair the issue by updating the powertrain control module (PCM). Palombi returned the vehicle a month later because the transmission continued to jerk. The vehicle remained at the facility for five days while the technicians attempted to correct the issue.

The engine and transmission problems persisted. About two weeks after the prior visit, Palombi again brought the vehicle in for engine problems, and the repair facility technicians replaced the PCM. Approximately two months later, Palombi brought the vehicle back to the repair facility because it continued to jerk, and the technicians replaced the transmission. Despite these efforts, the transmission problems continued,

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[2] We take the following facts from the evidence submitted by the parties on the motion for attorney fees.

requiring another visit a month later, when the technicians were unable to identify the source of the problem.

In all, Palombi took her vehicle to an FCA-authorized repair facility 11 times over a period of 16 months, but the engine and transmission problems persisted.

In late December 2013, Palombi contacted FCA customer service and requested that FCA repurchase the vehicle. On January 16, 2014, a FCA representative told Palombi that the vehicle "qualifie[d] under lemon law" and offered Palombi "repurchase of vehicle and [Palombi] accepted offer with the understanding that she will incur a mileage offset fee documented at 34,613 miles." A few days later, FCA requested documentation from Palombi, and Palombi informed FCA that she had retained an attorney. At one point, communications between Palombi and FCA temporarily ceased, and each party blames the other for the breakdown.

In April 2014, Palombi filed the instant action seeking damages under the Act, a civil penalty of up to two times her damages pursuant to section 1794, subdivision (c), based on the alleged willfulness of FCA's noncompliance with the Act, and reasonable attorney fees under section 1794, subdivision (d). FCA filed an answer asserting general denials and affirmative defenses.

On May 19, 2014, FCA sent Palombi a letter offering "to make restitution of the original purchase price, including any incidental and consequential expenses incurred" and to pay reasonable attorney fees and costs, "in exchange for return of the subject vehicle in an undamaged condition (save normal wear and tear), with all original equipment intact, clear title, current registration and a fully executed Release for all defendants." The letter stated that "this offer should not be construed as an

admission of liability." Palombi did not accept the offer, and the two sides commenced with written discovery.

In July 2014, FCA made its first offer of compromise pursuant to Code of Civil Procedure section 998 (hereafter 998 offer). FCA offered to repurchase the vehicle "in an undamaged condition, save normal wear and tear, for the amount of the vehicle down payment, any and all payments made, and the amount of [Palombi's] outstanding loan obligation" as well as "collateral charges and incidental costs . . . less a reasonable mileage offset in accordance with [section 1793.2, subdivision (d)(2)(C)], all to be determined by court motion if the parties cannot agree." Palombi did not accept the offer.

In April 2015, FCA served an amended 998 offer to "make restitution . . . in an amount equal to the actual price paid for the vehicle, including any charges for the transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, and registration fees and other official fees, plus any incidental damages to which the buyer is entitled under Civil Code [s]ection 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer, less a reasonable mileage offset in accordance with Civil Code [s]ection 1793.2(d)(2)(C), all to be determined by court motion if the parties cannot agree." FCA further offered to pay "costs and expenses, including attorney's fees based on actual time reasonably incurred in connection with the commencement and prosecution of this action pursuant to Civil Code [s]ection 1794(d), to be determined by the court if the parties cannot agree." In exchange, the offer proposed that "a judgment will not be entered. Rather, a general Release will be executed and the Complaint will be dismissed with prejudice." Palombi did not accept the offer.

Shortly thereafter, FCA made its second amended 998 offer, which was identical to its prior offer. Palombi did not accept.

In January 2017, FCA made its fourth amended 998 offer.[3] FCA offered, "without admitting liability," to pay Palombi $25,000 as well as reasonable costs, expenses and attorney fees (to be determined by stipulation or by the court). These terms were offered "in exchange for dismissal of this action with prejudice in its entirety and return of the subject vehicle." Palombi did not accept and served objections to FCA's fourth amended 998 offer.

In October 2017, FCA made its fifth amended 998 offer. FCA offered, "without admitting liability," to pay Palombi $75,000, reasonable costs, expenses, and attorney fees (to be determined by stipulation or by the court) in exchange for dismissal with prejudice. Palombi accepted the offer. ~(2AA 159)~

Thereafter, Palombi filed a motion for attorney fees, requesting $95,840.00 in fees, a 1.5 multiplier, and $19,445.60 in costs, for a grand total of $163,205.60. FCA opposed the motion, arguing in relevant part that the court should significantly reduce the attorney fee claim because Palombi's attorneys "apparently thwarted FCA's efforts to settle this case in early 2014 for no valid litigation objective." (Italics omitted.)

FCA submitted the supporting declaration of its counsel, Jon Universal, who accused Palombi's counsel of "stop[ping] the settlement process" and causing unwarranted delay in order to "run up" and "extort" attorney fees. Universal further stated that "FCA settled this case for purely economic reasons only, as opposed to spending more and more dollars taking

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[3] The record does not contain a copy of a third amended 998 offer.

this case to trial, battling two separate law firms." With her reply papers, Palombi filed written objections to several portions of Universal's declaration.

At an initial hearing on the motion, the trial court continued the matter to allow the parties to submit supplemental briefing on whether the court was required to rule on the parties' evidentiary objections and whether the court misunderstood the Act's penalty provisions.[4] In advance of the continued hearing date, the court issued its tentative ruling to award Palombi only $2,221.95 in attorney fees and costs. Specifically, the court tentatively determined "[i]t was not reasonable for [Palombi] to continue to prosecute her action after [FCA] offered to 'make restitution of the original purchase price, including any incidental and consequential expenses incurred . . .' and 'pay reasonable attorney fees and costs . . .' on May 19, 2014." Rejecting Palombi's argument that it was reasonable for her to continue litigating in order to pursue civil penalties for FCA's willful noncompliance with the Act, the court concluded that Palombi "fail[ed] to establish that she had a reasonable and good faith belief that she was entitled to an award of civil penalties. To the contrary, the available evidence suggests that [FCA] acted reasonably and in good faith in offering to comply with Civil Code section 1793.2(d)(2)" both before and after the action was filed. Based on its review of counsel's billing records, the trial court tentatively ruled that Palombi was entitled to $1,750 in attorney fees and $471.95 in costs incurred on or before May 19, 2014, but that all other requested fees, costs, and expenses were not reasonable.

At the October 2018 hearing, Palombi reasserted her evidentiary objections to Universal's declaration, raised additional objections, and

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[4] With its supplemental briefing, FCA submitted a supporting declaration of FCA employee Jerrod Bohannon. Palombi then filed written objections to Bohannon's declaration.

requested rulings on those objections, as well as on her objections to Bohannon's declaration. After hearing from the parties, the trial court adopted its tentative ruling as the order of the court. Palombi appealed.

DISCUSSION

A. *Appellate Jurisdiction*

As a preliminary matter, we address FCA's contention that the trial court's October 2018 order on Palombi's motion for attorney fees is not appealable because it was not included in a judgment and did not follow entry of a judgment. The record shows the entire action was dismissed with prejudice on May 3, 2019. Consequently, the trial court's denial of Palombi's motion and the later dismissal of the action with prejudice "have the legal effect of a final, appealable judgment, which encompasses the ruling on [her] motion for fees." (*Goldbaum v. Regents of University of California* (2011) 191 Cal.App.4th 703, 708.). FCA's contention is without merit.

B. *Failure to Rule on Evidentiary Objections*

Palombi argues the trial court's refusal to rule on her evidentiary objections to the declarations of Jon Universal and Jerrod Bohannon was, by itself, a prejudicial abuse of discretion. We disagree. When a trial court fails to rule on evidentiary objections presented in proper form, it is presumed that the objections have been overruled, that the trial court considered the evidence in ruling on the merits of the summary judgment motion, and that the objections are preserved on appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 533–534.) But while Palombi preserved her objections and was free to challenge the court's evidentiary rulings, she offers no argument that the court's consideration of any specific item of evidence constituted prejudicial error. (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 445 [prejudice from erroneous evidentiary rulings not presumed].) Standing alone, the trial

court's mere failure to sustain her evidentiary objections provides no basis to disturb the order challenged on appeal.

We now turn to Palombi's main contentions.

C. *Recovery of Attorney Fees and Costs Under the Act*

Palombi argues the trial court applied an incorrect legal standard and abused its discretion in cutting off her attorney fees and costs as of the date of FCA's May 2014 letter. She contends that she reasonably incurred fees and costs in eventually obtaining triple the value of FCA's prior offers, and that it was not unreasonable for her to reject FCA's prior offers because they contained unfavorable terms. For the reasons below, we agree.

The Act imposes a variety of obligations on manufacturers of goods sold in California, including manufacturers of new motor vehicles. (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184.) As relevant here, if a manufacturer is unable to service or repair a new motor vehicle to conform to applicable express warranties after "a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle" or "promptly make restitution to the buyer." (§ 1793.2, subd. (d)(2).) When restitution is at issue, the Act requires that the manufacturer "make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer." (§ 1793.2, subd. (d)(2)(B).)

The Act further specifies that "[a]ny buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief." (§ 1794, subd. (a).) "If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages." (§ 1794, subd. (c).) Additionally, a buyer prevailing in an action under section 1794 "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (§ 1794, subd. (d).)

On appeal, an award of attorney fees under the Act is reviewed for abuse of discretion. (*Goglin v. BMW of North America, LLC* (2016) 4 Cal.App.5th 462, 470 (*Goglin*).) " 'We presume the trial court's attorney fees award is correct, and "[w]hen the trial court substantially reduces a fee or cost request, we infer the court has determined the request was inflated." [Citation.] "The ' "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " ' " (*Id*. at pp. 470–471.) However, "the determination of whether the trial court *selected* the proper legal standards in making its fee determination is reviewed de novo [citation] and, although the trial court has broad authority in determining the amount of reasonable legal fees, the award can be reversed for an abuse of discretion when it employed the wrong legal standard in making its

determination." (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 434 (*East County Boulevard*).)

Here, the trial court's order explicitly and categorically excluded all fees and costs incurred after the May 2014 letter, finding it unreasonable for Palombi to continue litigating after FCA made a good faith offer of restitution. In light of this express recital, we cannot and do not apply the usual presumption that a court's substantial reduction of compensable costs and attorney fees resulted from a lodestar assessment that the request was excessive and therefore unreasonable. (See *Etcheson v. FCA US LLC* (2018) 30 Cal.App.5th 831, 846 (*Etcheson*).) Instead, we make a de novo assessment whether the court employed the appropriate legal standard in determining the fee and cost award. (*East County Boulevard*, *supra*, 6 Cal.App.5th at p. 434.)

Turning, then, to the trial court's stated rationale for its ruling, we review whether proper legal standards were employed to curtail Palombi's entitlement to fees after FCA's May 2014 letter.

In making this assessment, we first focus on the trial court's determination that Palombi failed to establish "a reasonable and good faith belief that she was entitled to an award of civil penalties." In this regard, the court appears to have disregarded the fact that Palombi's litigation efforts resulted in her recovery of $75,000, plus reasonable costs, expenses, and attorney fees. Standing alone, her recovery of the $75,000 amount was nearly triple the value of FCA's initial restitution offers, including the May 2014 conditional offer[5] to make restitution of the original purchase price of $25,749.

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[5] The conditional aspect of FCA's offer will be discussed below.

By failing to factor Palombi's actual recovery into its reasonableness assessment, the trial court applied the wrong legal standard. Indeed, it appears the court made the same error as the court in *Etcheson*, *supra*, 30 Cal.App.5th 831, which also involved FCA as defendant in a case under the Act. As the *Etcheson* court concluded under facts similar to those here, "[i]n substance and effect the [trial] court incorporated the penalty provisions of [Code of Civil Procedure] section 998 (applicable to instances—unlike this case—where the plaintiff's result obtained is *less than* the defendant's settlement offer) into its reasonableness analysis, and failed to acknowledge that plaintiffs for their counsel's litigation efforts recovered an amount more than double the value of FCA's initial restitution offers." (*Etcheson*, at p. 843.)

We next examine the trial court's assessment that FCA "acted reasonably and in good faith in offering to comply with Civil Code section 1793.2(d)(2)" both before and after the action was filed. On this score, the trial court evidently failed to consider the unfavorable and invalid aspects of FCA's May 2014 and other offers in concluding it was unreasonable for Palombi to reject them. (*McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 698, 708 (*McKenzie*).) As case law makes clear, it is not unreasonable for a plaintiff under the Act to reject a prelitigation settlement offer that contains unfavorable and extraneous nonfinancial terms, such as a vague release agreement or illegal conditions. (*Goglin*, *supra*, 4 Cal.App.5th at p. 471, citing *McKenzie*, at pp. 705–708 [plaintiff's insistence that 998 offer remove "breathtakingly" broad release condition was "reasonable as a matter of law"].)

Here, the record establishes that FCA's settlement offers included such terms. The May 2014 offer letter (as well as FCA's first amended 998 offer)

required Palombi to execute a release that provided no specific details on its terms and scope. (*Etcheson*, *supra*, 30 Cal.App.5th at p. 835 [settlement offer found "unacceptable" where it "required [plaintiffs] to sign a release without stating any release terms"].) Additionally, the May 2014 letter (as well as FCA's first 998 offer) purported to require that the vehicle be returned in "undamaged condition (save normal wear and tear)," without defining what that meant. In *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, the court found this very same term to be "undefined and subjective," rendering a settlement offer ambiguous and invalid for purposes of Code of Civil Procedure section 998. (*MacQuiddy*, at p. 1050.) Consistent with these authorities, we conclude it was reasonable as a matter of law for Palombi to reject offers containing such unfavorable and invalid terms.

In finding that Palombi failed to demonstrate a reasonable and good faith belief that she was entitled to civil penalties, and that instead, the evidence established the reasonableness and good faith nature of FCA's settlement offers, the trial court appeared to incorporate, as part of the fee motion, a merits determination on the willful nature of FCA's noncompliance with obligations under the Act. Section 1794 of the Act, however, merely requires that the court determine whether Palombi prevailed in the action.[6]

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[6] The Act does not define "prevail." (§ 1794, subd. (d).) Some appellate courts have looked by analogy to the definition of prevailing party under the general statute for recovery of costs. (See, e.g., *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 181; Code Civ. Proc., § 1032, subd. (a)(4) [defining prevailing party as including: party with net recovery; defendant in whose favor dismissal is entered; defendant where neither party obtains any relief; or defendant as against those plaintiffs who recover no relief against that defendant].) Others have opted against "rigid adherence" to Code of Civil Procedure section 1032 in favor of "a pragmatic approach" to

(§ 1794, subd. (d); see *Wohlgemuth*, *supra*, 207 Cal.App.4th at p. 1261 ["no particular *form* of judgment is indicated by the language of the statute, and the only express condition stated is that the buyer must have prevailed in the action"].) Here, there is no dispute that Palombi prevailed. (See *Wohlgemuth*, at p. 1263 [pretrial dismissal with prejudice pursuant to compromise agreement was "sufficient for purposes of section 1794(d) to allow an award of attorney fees and costs"].) Not only did Palombi obtain a net monetary recovery, she in fact recovered roughly her full damages, plus an amount equivalent to two times her damages (the maximum civil penalty allowed under section 1794, subdivision (c)). Given the undisputed nature of Palombi's prevailing status in this action, the trial court erred in requiring a showing of the willfulness of FCA's noncompliance with its statutory obligations.

FCA essentially urges that we adopt a rule requiring that a buyer must abandon a claim to civil penalties when the vendor offers restitution of the original purchase price. We decline to do so. Such a rule is particularly inappropriate where, as here, the vendor's settlement offer features the unfavorable and invalid terms outlined above. Because there was no court finding that FCA's conduct was "not willful as a matter of law" at the time of its May 2014 offer—and indeed, FCA continued to disclaim liability in its 998 offers—Palombi was "entitled to proceed to litigate the issue of FCA's willfulness and pursue [her] claims for not only restitution, but civil penalties under the Act." (*Etcheson*, *supra*, 30 Cal.App.5th at p. 847.)

Furthermore, in finding that FCA's conduct foreclosed Palombi from recovering civil penalties, the trial court expressly considered only FCA's

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determine if a buyer prevailed under the Act. (*Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1264 (*Wohlgemuth*).)

January 2014 repurchase offer and the offers thereafter.[7] There is no indication it considered the earlier 16-month period in 2012 and 2013, during which 11 attempts to repair the vehicle at FCA's authorized repair facilities were made to no avail. Palombi had, at the very least, an arguable claim to civil penalties for FCA's allegedly willful failure to "promptly" offer to replace or repurchase the vehicle based on its failed repair history. (§ 1793.2, subd. (d)(2).) Thus, she was entitled to continue litigating the issue of FCA's willfulness in order to pursue civil penalties. (*Etcheson*, *supra*, 30 Cal.App.5th at p. 847.) Indeed, the most critical factor in evaluating reasonableness is the degree of success obtained (*ibid.*), and here, the continued efforts of Palombi's counsel ultimately resulted in a settlement that included an amount roughly equivalent to the maximum statutory penalty under section 1794, subdivision (d).

Relying on *Dominguez v. American Suzuki Motor Corp*. (2008) 160 Cal.App.4th 53 (*Dominguez*), FCA contends that once a manufacturer makes a repurchase offer that is compliant with the Act, it is unreasonable for the buyer to continue litigating to pursue attorney fees or civil penalties. In

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[7] Notably, the January 2014 offer did not specify a repurchase price or track the language of section 1793.2, subdivision (d)(2)(B). Moreover, the offer contained a mileage offset of 34,613. Under the Act, when restitution is made pursuant to section 1793.2, subdivision (d)(2)(B), the amount may be reduced by a mileage offset calculated as a fraction having as its numerator "the number of miles traveled by the new motor vehicle prior to the time the buyer *first* delivered the vehicle to the . . . [manufacturer's] authorized service and repair facility for correction of the problem that gave rise to the nonconformity." (§ 1793.2, subd. (d)(2)(C), italics added.) Here, the record indicates that the vehicle had traveled less than 13,000 miles when Palombi first delivered it to an FCA-authorized repair facility. On this record then, it appears a 34,613-mile offset would not have complied with section 1793.2, subdivision (d)(2)(C). (See *McKenzie*, *supra*, 238 Cal.App.4th at p. 706 [plaintiff's refusal to accept offer with illegal clause was reasonable as matter of law].)

Dominguez, however, the appellate court determined that the buyer was not entitled to attorney fees and a civil penalty because: (1) he failed to establish a triable issue on the manufacturer's willful noncompliance for purposes of penalties under section 1794, subdivision (c); (2) he did not *prevail* in an action as contemplated by section 1794, subdivision (d); and (3) the vehicle in question (a motorcycle) did not constitute a "new motor vehicle" for purposes of recovery of attorney fees and penalties under section 1794, subdivision (e). (*Dominguez*, at pp. 59-60.) In contrast, Palombi was entitled to attorney fees under section 1794, subdivision (d), because she unquestionably prevailed in her suit by obtaining a settlement sum which included an amount equal to the maximum civil penalty allowed under the Act and which far exceeded all but the last of FCA's repurchase offers. Furthermore, there is no indication in *Dominguez* that the subject offer was conditioned on a vague release or other invalid or unfavorable terms that the buyer was reasonably entitled to reject. Simply put, *Dominguez* is inapplicable here.

For all of these reasons, we conclude the trial court's order limiting recovery of attorney fees and costs to those incurred on or before May 19, 2014, was based on erroneous criteria and must be reversed.

DISPOSITION

The order is reversed, and the matter is remanded with directions that the trial court award Palombi reasonable costs and attorney fees, including those incurred after FCA's May 2014 offer, as well as reasonable costs and fees incurred in pursuing her motion for fees and costs, based on the lodestar method. Palombi shall recover her costs on appeal.

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Fujisaki, Acting P.J.

WE CONCUR:

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Petrou, J.

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Jackson, J.

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